No. 46441-1

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

THE ESTATE OF RAY MERLE BURTON, Deceased.

APPELLANTS' REPLY BRIEF

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A. REPLY TO RESPONDENT'S SUMMARY OF FACTS

Mr. Burton was being transitioned from home health care to hospice care on January 24, 2014. (CP 46-47). The date was a Friday. The home health nurse, Lisa Erickson, was transitioning out and the hospice nurse, Shirley Outson, was transitioning in for care. (CP 46-47). The date can be confirmed by the testimony of Mr. White, Ms. Erickson, and resort to a calendar. Mr. White is fully able to testify to the things he observed personally on that date.

Similarly, Mr. White is able to attest to observing Mr. Burton write up what he wanted when each nurse was present. (CP 46-47). The fact that it appears to be two handwritings on the document submitted is only relevant if the Will is able to be offered as a holographic Will, which would require the entirety to be in the testator's handwriting. Appellant's counsel used the term "holographic" to refer to the handwritten testamentary document submitted. "Holographic" is defined as "[a] will or deed written entirely by the Testator or grantor with his own hand....." Black's Dictionary of Law, Fifth Ed. Holographic wills are not required to be witnessed, but are not sanctioned under Washington probate code provisions. *In re: Bauer's Estate*, 5 Wn. 2d 165, 170-171, 105 P. 2d 11 (1940).

At the time of White's original Petition for Probate, the testimony

of Lisa Erickson had not been obtained such that White could not present her as the second signatory until confirmed as such. (CP 48-49). That testimony was obtained and filed prior to later proceedings regarding the estate. (CP 14-15, 48-49).

White's motion for reconsideration was based upon Didricksen's assertion that two witnesses were required to validate a lost will which was an erroneous statement of law. White was unsure if that misstatement was a factor in the court's ruling. (VRP 27)

B. ARGUMENT

1. There are No Unresolved Claims and Appeal is Timely

Respondent argues that appeal may not be taken because unresolved claims remain in the probate proceeding. Specifically, Respondent Didricksen contends that Appellant White can pursue a claim that the document submitted as a testamentary document constitutes a contract to devise. While that claim may be pursued, it must be brought as a separate civil action to enforce the contract. *Cook v. Cook,* 4 Wn. App. 254, 481 P. 2d 941 (1971)(action brought against surviving spouse, individually and as Executrix of estate); *Bentzen v. Demmons*, 68 Wn. App. 339, 842 P. 2d 1015 (1993)(action to enforce oral contract to make a will); *Jennings v. D'Hooghe*, 25 Wn. 2d 702, 172 P. 2d 189(1946)(action

to compel specific performance of oral contract). That White has an alternative claim and may file a separate suit to pursue that claim does not render the instant case unfinished as to the actions of the trial court in ruling the estate is intestate. Didricksen cites no authority for such a proposition and White can find none.

2. Burton Substantially Complied with the Requirements for a Valid Will And Both Signed Documents Should Be Considered Part of a Consistent, Integrated Expression of Testamentary Intent.

Mr. White has produced a writing signed by the testator directing the disposition of his estate and signed by a witness, and a declaration of that witness attesting to her witnessing the Will of Mr. Burton. Mr. White has also provided the sworn testimony of a second witness who witnessed an earlier writing on the same day, written by Mr. Burton and signed by him, bequeathing his estate to Mr. White.

In Washington, the law with regard to execution of Wills does not require that the testator sign in front of the witnesses, or that the witnesses sign in the presence of each other. *Estate of Ricketts, 54 Wn. App. 221, 225, 773 P. 2d 93 (1989); Estate of Gardner, 69 Wn. 2d 229, at 236, 417 P. 2d 948(1966).* Accordingly, the fact that Shirley Outson signed a testamentary document after Lisa Erickson had signed a document and departed the house does not defeat the validity of the Will if the

documents, taken together, constitute a coherent, consistent expression of testamentary intent.

As set forth in Appellant's Opening Brief, the comment to the Uniform Probate Code for Section 2-502, which contains the same "writing" requirement as RCW 11.12.020, states that "[a]ny reasonably permanent record is sufficient. See Restatement (Third) of Property: Wills and Other Donative Transfers §3.1 cmt.i(1999)." Accordingly, there is no specific form or type of writing required. Mr. Burton created two writings on the same day that should be considered as part of a single testamentary disposition.

In order to find a validly executed will, caselaw in other jurisdictions permit the self-proving affidavit, as a separate document, to be considered a part of the Will, and to substantially comply with witness requirements. *In re Will of Ranney,* 124 N.J. 1, 589 A. 2d 1339(1991); *In the Matter of Petty's Estate*, 227 Kan. 697 at 702, 608 P. 2d 987 (1980), .

In Washington, *Estate of Ricketts*, *supra.*, refused to find substantial compliance with the statute of wills where an attestation provision signed by witnesses as a separate document was held not to comply with the statute. *Ricketts* was overruled by legislation which expressly permitted a separate attestation document to fulfill the requirements of witnessing a will. Similarly, the *Ranney* court found that

a separate document with witness signatures, even though not on the Will itself, substantially complied with the requirements of the statute of willsl.

If witnesses can sign on a completely separate document and have that document included as part of the Will, it would seem reasonable to permit a document with a witness signature, the testator's signature and a restatement of the testamentary provisions to be considered part of the Will. It is arguable that permitting integration of the two documents as two parts of the same will is consistent with Washington's statute of wills given the legislature's response to the *Ricketts* decision. RCW 11.12.020.

White seeks inclusion of both documents as parts of a testamentary disposition. Inclusion of both documents, where the above-authorities permit a separate page with self-proving affidavit signatures to be considered a part of the Will, substantially complies with the requirements of Washington's statute of wills.

Didricksen's argument that counterparts must be identical ignores the exigencies of the circumstances. The testator had no ability to photocopy a document. He attempted to re-state an earlier document, it is unlikely it will be like a photocopy of the earlier document. However, White would argue that the law would also support a finding that the second document is analogous to the self-proving affidavit in that it supplies the second witness' signature, and is also signed by Mr. Burton

and Mr. Burton restated the testamentary disposition. Mr. Burton's re-write was remarkably similar to the first document based on the testimony of Lisa Erickson, and elevating form over substance in this case would disregard the extreme circumstances of the situation, and would frustrate the clear intention of the testator.

Didricksen responds to several arguments which have not been advanced on appeal, including the issue of nuncupative will and agreement to devise. Any cause of action for contract or agreement to devise must be pursued as a separate action, as set forth above.

Didricksen makes the unsupported statement that the "legislature has intended strict compliance with the statute of wills." (Respondent's Brief, page 15). No authority is cited. However, the legislature responded to the strict application of the statute in Ricketts with an amendment of the statute to allow a separate attestation document with witness signatures. (RCW 11.12.020).

Further, authorities cited above confirm that Washington requires a "writing" and the testator's signature and two witnesses. (See Section 2, p. 3 herein). All of those elements are present in this case. That the testator documented the "writing" in two separate pages and signed both pages and had both pages witnessed by different witnesses substantially complies with the statute.

3. White Has Established That a Portion of the Will Was Lost.

If a separate document with witness signatures can be included as part of the will and can validate a will, what would occur if such a page were lost? Does the entire will have to be lost in order for testimony to be offered as to the existence of the will or a part of the will?

RCW 11.20.070 sets forth the required proof of a lost will, stating, "[t]he provision of a lost or destroyed will must be proved by clear, cogent, and convincing evidence, consisting at least in part of a witness to . . . its contents . . ." RCW 11.20.070(2). The statute requires the testimony of a single witness to the contents of the lost will and no longer requires proof that the lost will was in existence at the testator's death. Estate of Black, 153 Wn. 2d 152, 161-162, 102 P. 3d 796 (2004)

In the present case, we have effectively lost a page containing a second witness' signature, although it also contained the same testamentary provisions and the signature of the testator. Under similar facts, the court in *In re Mack's Will*, 250 N.Y.S. 2d 177, 21 A.D. 2d 205(1964) admitted a will to probate on the testimony of the attesting witnesses. In *Mack*, the page containing the signatures of the attesting witnesses was lost. The Will was, nonetheless, admitted to probate, but was challenged on the ground that the missing signatures constituted a revocation. Both witnesses testified to the execution of the will and there

was no credible evidence of revocation and the admission of the will was confirmed.

In the present case, had both documents been located, and been submitted as decedent's will, they would have met the requirements of a writing, signed by the testator, and witnessed by two individuals. That a page has been lost should not preclude testimony by the witness whose signature was lost as to the document signed. Appellant can find no Washington case specifically dealing with a lost portion of a will. Accordingly, this would be a matter of first impression.

4. This Court Can Interpret Evidentiary Rules *De Novo*.

Interpretation of an evidentiary rule is subject to *de novo* review. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)(Interpreting ER 404(b) for evidence of common scheme or plan). The evidentiary objections interposed by Didricksen under the hearsay rule and the deadman's statute are inapplicable to the evidence at issue. (See Appellant's Opening Brief, p. 17-20). If any evidence that is relied upon in reaching a decision in this case is subject to an evidentiary objection, White requests this court's interpretation of the evidentiary rules in question.

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5. Attorneys' Fees Should Be Denied.

While White did not believe the TEDRA attorney fee provision applied to a case not brought under TEDRA, but rather in the probate proceeding, a review of authorities indicates that attorneys' fees may be sought in a probate proceeding where there are disputed issues, whether or not a party files a TEDRA petition. *Kitsap Bank v. Denley,* 177 Wn. App. 559, at 312 P. 3d 711(2013).

RCW 11.96A.150 makes an award of attorneys' fees discretionary, and "as the court determines to be equitable." Didricksen has presented no argument for why attorneys fees should be awarded under RCW 11.96A.150. Didricksen has offered no grounds in equity for an award of fees. It is difficult to respond to such a request without any authority or argument being presented for the equitable bases for such a request.

In awarding fees, the court may consider any relevant factor, "including whether a case presents novel or unique issues." *Bale v. Allison*, 173 Wn. App. 435, at 461, 294 P. 3d 789(2013), *citing In Re Guardianship of Lamb,* 173 Wn. 2d 173, 198, 265 P.3d 875(2011).

This case appears to be one of first impression in seeking review of the validity of a will executed in "counterparts" or a case involving two documents which should be considered part of a single testamentary "writing." White asks that the court consider both documents to be part of

the Will in much the same way that a separate document containing an attestation of witnesses is permitted to be considered as part of the Will.

Attorneys' fees should be denied.

A. CONCLUSION

The stated purpose of the statute governing execution of Wills is to ensure the testator has a definite and complete intention to dispose of his property, and to prevent, as far as possible, fraud, perjury and mistake. Where Mr. Burton, with his death imminent, wrote out his wishes twice on the same day, with the intention that the writings be his last will and testament, and signed the documents before two separate witnesses, the documents should be considered to be a single testamentary disposition. That one page of the document has been lost should not work to invalidate the intent of the decedent. Mr. Burton's two documents constitute a "writing" signed by him as testator and signed by two witnesses. Mr. Burton complied with RCW 11.12.020.

DATED: January 9, 2015

Respectfully submitted:

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By: 

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January 09, 2015 - 3:49 PM

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